

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 20**

**SAN FRANCISCO JAZZ ORGANIZATION**

**Employer**

**and**

**Case 20-RC-239791**

**THEATRICAL EMPLOYEES UNION,  
LOCAL B18**

**Petitioner**

**REGIONAL DIRECTOR'S DECISION TO SUSTAIN CHALLENGES TO SIX BALLOTS  
AND  
ORDER DIRECTING THE OPENING AND COUNTING OF REMAINING  
CHALLENGED BALLOTS**

Upon a petition filed on April 17, 2019,<sup>1</sup> and pursuant to a Stipulated Election Agreement (Agreement) that I approved on April 25, an election by secret manual ballot was conducted on May 17 in the following appropriate collective-bargaining unit:

All regular full-time and part-time front of the house employees, including box office employees and ushers, excluding all other employees including clerical personnel, managerial employees, all other professional employees, guards, and supervisors as defined the Act.

The parties also agreed, in pertinent part, that:

Those eligible to vote in the election are employees in the above unit who were employed during the payroll period ending April 10, 2019, including employees who did not work during that period because they were ill, on vacation, or were temporarily laid off.

Also eligible to vote are all employees in the unit who have worked an average of four (4) hours or more per week during the 13 weeks immediately preceding the eligibility date for the election.

Others permitted to vote: The parties have agreed that FOH Managers/House Managers may vote in the election but their ballots will

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<sup>1</sup> All dates are calendar year 2019.

be challenged since their eligibility has not been resolved. No decision has been made regarding whether the individuals in these classifications or groups are included in, or excluded from, the bargaining unit. The eligibility or inclusion of these individuals will be resolved, if necessary, following the election.

Upon the conclusion of the election, the ballots were counted, and a copy of the official *Tally of Ballots* was served on each party. The *Tally* showed that 10 employees voted in favor of representation by the Theatrical Employees Union, Local B18 (Petitioner), that 8 voted against representation by the Petitioner, and that 10 individuals cast challenged ballots. The challenged ballots are sufficient in number to affect the results of the election.

### **THE CHALLENGED BALLOTS**

In accordance with the parties' Agreement, the Board agent challenged the ballots cast by the four FOH Managers/House Managers: Stephen Weiss, Lucie Faulknor, Mark Malaspina, and Mark Rosengarden. At the election, and as before, the Employer took the position that those four voters are ineligible to vote because they are supervisors as defined by Section 2(11) of the Act. Petitioner took a contrary position.

The Board agent also challenged the ballots of six individuals whose names did not appear on the voter list. At the count, the Employer took the position that those six challenged ballots should not be opened and counted because the voters who cast them did not meet the minimum hourly requirements set forth in the parties' Agreement to qualify as regular part-time employees. Petitioner took a contrary position.

By letter dated May 20, I asked the parties to provide their statements of position with respect to each of the challenges together with their evidence to support their positions, and the parties thereafter complied. In their respective position statements, the parties agreed that the FOH Managers/House Managers are not statutory supervisors; rather, Stephen Weiss, Lucie Faulknor, Mark Malaspina, and Mark Rosengarden are employees eligible to vote in the election. They subsequently executed a stipulation to open and count those four ballots, which I approved on May 31.

*The Six Remaining Challenged Ballots:*

With regard to the remaining six challenged ballots, the parties continue to disagree on their eligibility. The Employer takes the position, and demonstrated through payroll records, that the six subject voters did not work an average of at least four hours per week during the calendar quarter immediately preceding the April 10 eligibility date for the election.<sup>2</sup> It contends that Board policy and the parties' Agreement establish that the standard *Davison-Paxon*<sup>3</sup> formula applies here and, accordingly, the six subject voters are ineligible. For its part, Petitioner does not dispute the number of hours actually worked, but argues that the parties did not stipulate that the *Davison-Paxon* formula would determine voter eligibility and that, in its view, an alternative eligibility formula should be utilized.

Notwithstanding Petitioner's argument to the contrary, read together and in context, the unit description and the *Davison-Paxon* formula set forth in the Agreement clearly establish that the *Davison-Paxon* formula is to be utilized here; to wit, that in order to be considered a regular part-time employee and eligible to vote, the employee must have "worked an average of four (4) hours or more per week during the 13 weeks immediately preceding the eligibility date for the election." Indeed, there is no other way to construe the parties' Agreement. It would run contrary to logic and practice to conclude that regular part-time employees include those who averaged less than four hours of work per week during the preceding quarter, while adding the *Davison-Paxon* formula as a redundant qualifier to "also" allow those who worked more regularly to vote.

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<sup>2</sup> Erica Andracchio averaged 0.31 hours/week; Ann Jackson averaged 1.81; George Koster averaged 0.94; Lisabeth Norris averaged 3.00; George Willis averaged 2.46; and Melinda Stefanski averaged 3.17.

<sup>3</sup> Absent special circumstances, the Board applies the standard formula set out in *Davison-Paxon Co.*, 185 NLRB 21 (1970), to evaluate whether a casual employee has worked a sufficient number of hours with sufficient regularity to share a "real continuing interest in the terms and conditions of employment offered by the employer." Under the *Davison-Paxon* formula, an employee who regularly averages 4 hours or more per week for the last quarter prior to the eligibility date "has a sufficient community of interest for inclusion in the unit and may vote in the election." *Davison-Paxon*, supra at 23-24.

In cases where, as here, the parties have entered into a clear and unequivocal written stipulation agreement, the agreement is an expression of the parties' intent and if the agreement does not violate any express statutory provisions or established Board policies the Board will not override that expression of intent. *Southern Monterey County Hospital d/b/a George L. Mee Memorial Hospital*, 348 NLRB 327 (2006). Thus, the Board has enforced unambiguous agreement provisions on such subjects as the unit for voting, minimum hours of work required for eligibility, and the polling places for specific groups of employees. I am not authorized to modify or ignore the terms of the parties' Agreement. See e.g., *Windham Community Memorial Hospital*, 312 NLRB 54, 55 (1993) (Bd reversed regional director who did not apply the eligibility formula set forth in the parties' agreement). Accordingly, I sustain the Employer's challenges to those six ballots.

#### **CONCLUSION AND DIRECTION TO OPEN AND COUNT SIX DETERMINATIVE CHALLENGED BALLOTS**

Based on the above, I sustain the Employer's challenges to the ballots cast by the six employees who did not work a sufficient number of hours to qualify as eligible under the agreed-upon *Davison-Paxon* formula.

In accordance with the parties' stipulation resolving the challenges to the ballots cast by Stephen Weiss, Lucie Faulknor, Mark Malaspina, and Mark Rosengarden, I hereby direct that those ballots be opened and counted on June 10, 2019 at 10:00 a.m. at the Regional Office. After the count, a *Revised Tally of Ballots* will issue.

#### **RIGHT TO REQUEST REVIEW**

Pursuant to Section 102.69 (c)(2) of the Board's Rules and Regulations, any party may file with the Board in Washington, D.C., a Request for Review of this Decision. This Request for Review must conform with the requirements of Sections 102.67(e) and (i)(1) of the Board's Rules and must be received by Washington by June 18, 2019. If no request for review is filed, the decision is final and shall have the same effect as if issued by the Board.

A request for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to [www.nlrb.gov](http://www.nlrb.gov), select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Dated: June 4, 2019

*/s/ Jill Coffman*

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JILL H. COFFMAN  
REGIONAL DIRECTOR  
NATIONAL LABOR RELATIONS BOARD  
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